

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 6, 2008 Session

KENNETH RAYMOND GREEN v. MICHELLE A. GREEN (REID)

**Appeal from the Circuit Court for Rutherford County
No. 52851 Royce Taylor, Judge**

No. M2007-01263-COA-R3-CV - Filed February 11, 2009

Father appeals the trial court's dismissal, in a *de novo* appeal from juvenile court, of his petition to find his children dependent and neglected based on evidence at the time of the hearing in circuit court. He argues that the circuit court's statement that the situation at the time of the juvenile court proceeding justified that court's finding of dependency and neglect precluded further action by the circuit court and vested jurisdiction back in the juvenile court to determine custody. We disagree and find that if on appeal the circuit court finds the conditions of dependency and neglect do not exist, then the dependency and neglect proceedings must be dismissed. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Charles G. Blackard, III, Barry L. Gardner, Luke A. Evans, Brentwood, Tennessee, for the appellant, Kenneth Raymond Green.

Stephen W. Pate, Murfreesboro, Tennessee, for the appellee, Michelle Ann Green (Reid).

OPINION

Father filed a petition in juvenile court alleging that the three minor children in Mother's custody were dependent and neglected. The juvenile court granted Father's petition and designated Father as the parent with primary custody. Mother appealed the juvenile court finding to circuit court under Tenn. Code Ann. § 37-1-159(a). After the circuit court tried this neglect and dependency matter *de novo*, it found that circumstances creating the neglect and dependency existed earlier when the juvenile court heard the matter but in the intervening months said circumstances had been removed. The circuit court reasoned that since the neglect and dependency no longer existed, then the circumstances warranting transfer of custody no longer existed. Consequently, the circuit court remanded the case to the juvenile court with instructions to reinstate the custody arrangement that

existed before the dependency and neglect petition was filed, *i.e.* as it existed in the parties' divorce decree entered years earlier, so that Mother had primary custody.

Father appealed the circuit court decision to this court. The question before this court involves the proper technical disposition of an appeal to circuit court when the circuit court finds that the dependency neglect has been remedied pending the appeal to the circuit court from juvenile court; specifically, whether juvenile court jurisdiction continues as to custody arrangements.

I. JUVENILE COURT PROCEEDINGS

On March 3, 2005, Father filed a petition in the Juvenile Court of Rutherford County under Tenn. Code Ann. § 37-1-102(b)(12) alleging that his three minor children in the custody of their mother were dependent and neglected. According to the amended petition filed on March 18, 2005, Mother's husband was a convicted sex offender in Alabama. Father alleged Mother allowed the children to be in the presence of her husband which resulted in Mother being "cruel, and unprotective of her children, and has exposed the children to grave danger such that the mother is unfit to properly care for the children."

Before Father filed his petition, the children had been residing with Mother pursuant to the parties' final decree of divorce and parenting plan entered on December 11, 2003, in the Rutherford County Circuit Court.¹

Apparently, shortly after Father filed his petition, the juvenile court ordered that the three minor children be placed in Father's custody. We glean this from the record since in Mother's answer, she makes reference to a "temporary custody order" vesting Father with temporary custody of the children and a March 8 hearing on the matter. There is no such order in the record on appeal or transcript of the March 8 hearing. In a subsequent order,² there is also reference to an April 7, 2005 order setting visitation for Mother with the children, which is likewise not in the record. Nevertheless, it appears that early on the juvenile court placed custody of the children with Father and granted Mother visitation.

Following a trial, the juvenile court entered an order on Father's petition on November 30, 2005. The juvenile court found that after Father filed the petition, Mother married a man who was a convicted and registered sex offender in Alabama, that Mother knew of the conviction and chose to marry him with that knowledge. The juvenile court found Mother allowed the stepfather, Mr. Reid, to be in the children's presence alone and as a consequence, Mother "by reason of immorality, is unfit to properly care for the children." Further, since Mother allowed her children to be in the stepfather's presence with improper controls and failed to protect them from exposure and a close

¹Father could have petitioned the court that entered the parties' divorce for a change of custody based upon a material change of circumstances. If Father has concerns in the future about the children, this avenue remains available to him.

²The Juvenile Court's order on the petition dated November 30, 2005, makes this reference.

relationship with a sex offender, the juvenile court found the children to be dependant and neglected and that Father “is the proper party to provide for their protection, and with custody being vested with him.” Mother was ordered to allow the children to have “absolutely no contact with the step father.” The juvenile court reaffirmed its prior April 7, 2005 order giving Mother visitation, ordered Mother to pay child support, and awarded Father his attorneys’ fees.³

Mother then appealed the Juvenile Court’s order to the Circuit Court under Tenn. Code Ann. § 37-1-159(a).

II. CIRCUIT COURT PROCEEDINGS

The Circuit Court conducted hearings *de novo* on Father’s petition on September 6, 2006 and January 24, 2007. The court heard testimony of the parties, witnesses, and stipulation of the parties as to testimony of witnesses who appeared before the Juvenile Court. At that hearing, Mother explained that she was proceeding with a divorce action against Mr. Reid.⁴ The Circuit Court made the following relevant factual findings in its February 14, 2007 order, which are basically not in dispute:⁵

In consideration of the statutory definition of dependant and neglect, pursuant to T.C.A. § 37-1-102(12)(C), the court finds that based upon the petition filed by father on March 3, 2005 and the amended petition filed on March 18, 2005, answer by mother filed by March 31, 2005, and the evidence presented regarding all pleadings, is generally admitted that the children were dependant and neglected, pursuant to statute defining a dependant or neglected child who is under unlawful or improper care, supervision, custody or restraint by any person. It is the courts findings that by mother residing with [step-father], and exposing the minor children to [step-father], who was a registered sex offender, that [step-father’s] conduct was unlawful, as he was under a duty not to be around children, and was in violation of his probation, and thus the allegations as set forth in father’s petition were true based upon admitted testimony. Therefore, the court is of the opinion that pursuant to father’s original petition filed in the Juvenile Court, the parties minor children were dependant and neglected and it was appropriate to transfer temporary legal custody to father. The court further finds that subsequent actions by mother have removed the dependant and neglect, as she is no longer residing with [step-father] unlawfully, and the court specifically finding there was no actual harm suffered by the children, but only potential danger and conditions for the dependancy and neglect, which have been removed by mother, and therefore, the basis for the temporary legal custody to father

³The Juvenile Court also refers to a guardian ad litem that is not referenced elsewhere in the record.

⁴Mother and Mr. Reid had a child as well. As will be discussed later, this divorce appears to have become final during these proceedings.

⁵Father argues the court’s conclusions are in error, but not the factual predicates.

no longer exists. ... Pursuant to T. C. A. § 37-1-159(c), the Circuit Court shall remand the case to the Juvenile Court for enforcement of the judgement rendered by the Circuit Court therefore, this case shall be remanded to the Juvenile Court for Rutherford County, Tennessee, for the purpose of the Juvenile Court altering the temporary custody order and placing the children under the care and control of the primary residential parent as designated in the parties divorce action filed in the Circuit Court for Rutherford County, Tennessee, case # 47884, that names mother as the primary residential parent of the parties three minor children in the final parenting plan, and with said plan having never been modified subsequent to the entry of the final decree of divorce. Further, mother shall remain as the primary residential parent and the children to be returned to her custody, until such time as the final decree of divorce and final parenting plan is modified upon petition filed by father.

It is, therefore, **ORDERED ADJUDGED** and **DECREED** that this case shall be remanded to the Juvenile Court for Rutherford County, Tennessee, for the entry of an order, reinstating mother as the primary residential parent of the parties three minor children, consistent with the parties final decree of divorce and final parenting plan, entered the 11th day of December, 2003, by the Honorable J. S. Daniel, Judge of the Circuit Court for Rutherford County, Tennessee, docket # 47884, and with the Juvenile Court to determine how the temporary custody arrangement will be removed from father and vested with mother.

It is finally **ORDERED** that the issue of attorney's fees and court costs shall be finally determined by the Juvenile Court, upon remand.

The Circuit Court denied Father's Rule 59 motion to alter or amend its February 14, 2007 order. Father then appealed the Circuit Court's February 14, 2007 judgment to this court.

III. ON REMAND TO JUVENILE COURT

While the matter was pending before this court on appeal, the proceedings below were not stayed, and the juvenile court complied with the circuit court order.

Upon remand, the juvenile court entered an order on September 28, 2007, wherein it decided how the temporary custody arrangement would be altered, or set aside, consistent with the circuit court's order that Mother be reinstated as the primary residential parent as ordered in the parties' divorce decree. Since the juvenile court had no "current knowledge regarding mother's residence since February 2007 to date, the condition of her home or any other parties residing therein," the court ordered a home study of Mother's home. Custody of the children remained with Father pending the study, with Mother to have residential visitation as specified.

Also, in its September 2007 order, the juvenile court ordered Mother to have no contact with Mr. Reid in the presence of the three children. The court further specified that any contact between Mother and Mr. Reid in which he exercised residential time with his child must be done outside the presence of the three children.

In its November 6, 2007, order, the juvenile court ordered that the children be placed in Mother's custody. "[F]inding no reason that mother's present residence is not a suitable environment for the parties children" and since it had a "legal duty" to enforce the circuit court's order, the juvenile court reinstated Mother as the primary residential parent under the terms of the parties' divorce decree and final parenting plan.

The juvenile court concluded that, under the terms of the remand, it had no authority to place restrictions, conditions, or terms on Mother's custody. While the juvenile court noted that it "continues to have concerns regarding mother allowing [Mr. Reid] to have any contact or communication with the parties' minor children," and "strongly" suggested that it would not be in the children's best interest to have contact with Mr. Reid, the juvenile court found that it had no jurisdiction to place this condition on Mother's custody under the circuit court order.⁶ Accordingly, the juvenile court formally and expressly relinquished jurisdiction of the parties and their three minor children.

IV. ISSUES ON APPEAL

On appeal, no one questions the factual basis upon which the trial court found that the circumstances that led to a dependency and neglect finding had been eliminated, *i.e.*, Mother was no longer living with Mr. Reid. In other words, at the time of the hearing in circuit court, no facts establishing dependency and neglect existed.

While Father does not dispute the circuit court's finding that Mr. Reid was no longer in Mother's home, Father challenges the circuit court's disposition of the case and its instructions to the juvenile court on remand. On appeal, Father argues that the trial court erred when it remanded the matter to juvenile court with orders to restore custody as it existed prior to the juvenile court order placing custody with Father. Father argues that once the circuit court found that the children had been dependent and neglected at one time, then jurisdiction under Tenn. Code Ann. § 37-1-103(a)(1) attached and remained with the juvenile court to determine custody.

In order to address Father's issues, we must review the statutory scheme governing proceedings on dependency and neglect as well as the roles of the juvenile court and the circuit court in such proceedings.

⁶ At this point the juvenile court is referring to Mr. Reid as Mother's "ex-husband" which leads to the conclusion that by the time of the home study Mother and Mr. Reid were divorced.

V. STATUTORY FRAMEWORK GOVERNING DEPENDENCY AND NEGLECT PROCEEDINGS

The legislature has described what constitutes dependency and neglect, the procedures and steps to be taken in making this determination, and the jurisdiction of the juvenile courts.

A “dependent and neglected child” is a child:

- (A) Who is without a parent, guardian or legal custodian;
- (B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;
- (C) Who is under unlawful or improper care, supervision, custody or restraint by any person, corporation, agency, association, institution, society or other organization or who is unlawfully kept out of school;
- (D) Whose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care for such child;
- (E) Who, because of lack of proper supervision, is found in any place the existence of which is in violation of law;
- (F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;
- (G) Who is suffering from abuse or neglect;
- (H) Who has been in the care and control of an agency or person who is not related to such child by blood or marriage for a continuous period of eighteen (18) months or longer in the absence of a court order, and such person or agency has not initiated judicial proceedings seeking either legal custody or adoption of the child; or
- (I) Who is or has been allowed, encouraged or permitted to engage in prostitution or obscene or pornographic photographing, filming, posing, or similar activity and whose parent, guardian or other custodian neglects or refuses to protect such child from further such activity.

Tenn. Code Ann. § 37-1-102(b)(12).

The General Assembly vested juvenile courts with “exclusive original jurisdiction” to hear allegations that a child is dependent and neglected as defined above. Tenn. Code Ann. § 37-1-103(a)(1). The statutes governing dependent and neglect proceedings require, in effect, a two step analysis. First, under Tenn. Code Ann. § 37-1-129, the court is to hold a hearing and make findings whether a child is dependent and neglected. If the court finds the child is not dependent and neglected, then the petition must be dismissed, and the court has no jurisdiction to determine custody. *In re E.P.*, W2004-02821-COA-R3-CV, 2005 WL 3343807, at *3-4 (Tenn. Ct. App. December 9, 2005) (no Tenn. R. App. P. 11 application filed).

After hearing the evidence on the petition, the court shall make and file its findings as to whether the child is a dependent or neglected child, . . . If the court finds that the child is not a dependent or neglected child . . . , it shall dismiss the petition and order the child discharged from any detention or other restriction theretofore ordered in the proceeding.

Tenn. Code Ann. § 37-1-129(a)(1).

On the other hand, if the juvenile court finds the child to be dependent and neglected by clear and convincing evidence, then the juvenile court is to proceed immediately or at a postponed hearing to make “a proper disposition in the case.” Tenn. Code Ann. § 37-1-129(c). Making a “proper disposition” requires the court to make a custody decision “best suited to the protection and physical, mental and moral welfare of the child.” Tenn. Code Ann. § 37-1-130(a). The court may award custody to the child’s parents, guardian or custodian with conditions and limitations as directed by the court “for the protection of the child.” Tenn. Code Ann. § 37-1-130(a)(1). Alternatively, the court may place the child in the custody of any individual whom the court finds “to be qualified to receive and care for the child.” Tenn. Code Ann. § 37-1-130(a)(2)(A).⁷

Due to the unique nature of these proceedings, the legislature has provided for continuing jurisdiction in a dependency and neglect matter until one of several enumerated events occurs. Tenn. Code Ann. § 37-1-103(c); *In re D.Y.H.*, 226 S.W.3d 327, 330 (Tenn. 2007). Specifically,

When jurisdiction has been acquired under the provisions of this part, such jurisdiction shall continue until the case has been dismissed, or until the custody determination is transferred to another juvenile, circuit, chancery or general sessions court exercising domestic relations jurisdiction, or until a petition for adoption is filed regarding the child in question as set out in § 36-1-116(f). However, the juvenile court shall retain jurisdiction to the extent needed to complete any reviews or permanency hearings for children in foster care as may be mandated by federal or state law. This provision does not establish concurrent jurisdiction for any other

⁷ Additionally, under specified circumstances not present in this case, the court may also place custody of the child with the Department of Children’s Services. Tenn. Code Ann. § 37-1-130(a)(2)(B).

court to hear juvenile cases, but merely permits courts exercising domestic relations jurisdiction to make custody determinations in accordance with this part. Notwithstanding any other law to the contrary, transfers under this provision shall be at the sole discretion of the juvenile court and in accordance with § 37-1-112. In all other cases, jurisdiction shall continue until a person reaches the age of eighteen (18), except that the court may extend jurisdiction for the limited purposes set out in § 37-1-102(b)(4)(B) until the person reaches the age of nineteen (19).

Tenn. Code Ann. § 37-1-103(c).

Accordingly, once jurisdiction is acquired in a dependency and neglect proceeding, the jurisdiction continues over the child until one of the following four events: (1) the petition is dismissed, (2) the case is transferred, (3) an adoption petition is filed, or (4) the child reaches 18. *In re D.H.Y.*, 226 S.W.3d at 330. Neither adoption nor transfer⁸ is at issue in this case and the children remain minors. Therefore, only dismissal is relevant to the arguments herein.

As discussed earlier herein, Tenn. Code Ann. § 37-1-129(a)(1), provides that “[i]f the court finds that the child **is not** a dependent or neglected child . . . , it shall dismiss the petition and order the child discharged from any detention or other restriction theretofore ordered in the proceeding.” (emphasis added). Once a court dismisses a dependency and neglect petition, then the court loses jurisdiction. *Toms v. Toms*, 98 S.W.3d 140, 143-44 (Tenn. 2003); *In re E.P.*, 2005 WL 3343807, at *3 - 4.

VI. ROLES OF JUVENILE AND CIRCUIT COURTS IN DEPENDENCY AND NEGLECT CASES

Juvenile courts are courts of limited jurisdiction. *In re D.Y.H.*, 226 S.W.3d at 330; *In re S.L.M. and T.J.M.*, 207 S.W.3d 288, 296 (Tenn. Ct. App. 2006). Juvenile courts are creations of legislation and were not known in the common law. *In re S.L.M. and T.J.M.*, 207 S.W.3d at 296. Consequently, juvenile courts “may exercise only such jurisdiction and powers as have been conferred on them by statute.” *In re D.Y.H.*, 226 S.W.3d at 330; *In re S.L.M. and T.J.M.*, 207 S.W.3d at 296.

While the jurisdiction of juvenile courts is limited, our courts have been ever mindful of the purpose of such courts. In 1918, when the Tennessee Supreme Court upheld the validity of the juvenile courts, the Court found as follows:

These [juvenile] courts were established for the protection of our children, and are expressly authorized to remove delinquent or dependent children from unfavorable surroundings and adjudicate their proper custody, and separate them from their

⁸On appeal, no one argues that the circuit court attempted or effectuated a transfer under Tenn. Code Ann. § 37-1-112(b).

parents when such action appears to be for the best interests of the child. The jurisdiction conferred on these tribunals in such matters is ample.

State ex rel. v. West, 201 S.W.743, 745 (Tenn. 1918).⁹ The “primary purpose” in a dependency and neglect proceeding “is to provide for the care and protection of children.” *Department of Children’s Services v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006) (citing *In re M.J.B.*, 140 S.W.3d 643, 651 (Tenn. Ct. App. 2004)).

The legislature has specifically conferred on juvenile courts exclusive original jurisdiction¹⁰ to hear dependency and neglect matters and the authority to make a “proper disposition” if dependency and neglect are found, *i.e.*, decide who is to have custody of the child. Tenn. Code Ann. § 37-1-130; *In re D.Y.H.*, 226 S.W.3d at 331.

In dependency and neglect cases, the legislature has directed that any appeal from the juvenile court is to be heard by the circuit court.¹¹ It is not just a finding that a child is dependent and neglected that is appealable to circuit court. “[A]ny custody decision that is made during a dependency and neglect proceeding is a part of the dependency and neglect proceeding and appealable to circuit court.” *In re D.Y.H.*, 226 S.W.3d at 331 (citing *Tennessee Department of Children’s Services v. Owens*, 129 S.W.3d 50, 55 (Tenn. 2004)). As the Supreme Court explained:

a subsequent decision by the juvenile court on whether to modify an initial custody order will also arise from and be a part of the neglect and dependency proceeding. This is true even if a petition for a change of custody does not reference the neglect and dependency hearing and even if it is filed years after the final order is entered. Accordingly, any appeal from such a custody decision is to be made to circuit court. *See* Tenn. Code Ann. § 37-1-159(a); *In re T.M.C.*, No. M2004-02653-COA-R3-JV, 2005 WL 3555542, at *2 (Tenn. Ct. App. Dec. 28, 2005) (holding that a custody proceeding in juvenile court occurring subsequent to a neglect and dependency finding was properly appealable to circuit court); *see also Lokey v. Griffin*, 45 Tenn.

⁹ For a thorough analysis of the statutory history of juvenile courts’ jurisdiction up to 2005, *see* Judge Cain’s analysis in *In re T.M.C.*, M2004-02653-COA-R3-JV, 2005 WL 3555542 (Tenn. Ct. App. December 28, 2005) (no Tenn. R. App. P. 11 application filed).

¹⁰ Since its jurisdiction is “exclusive,” when a juvenile court has asserted jurisdiction then no other court may take any action affecting the child’s custody without first obtaining the juvenile court’s approval for a transfer. *Tennessee Dep’t of Human Servs. v. Gouvitsa*, 735 S.W.2d 452, 455-57 (Tenn. Ct. App. 1987); *In re McCloud*, 01-A-01-9212-CV00504, 1993 WL 194041, at *6 (Tenn. Ct. App. 1993) (citing *Kidd v. State ex rel Moore*, 338 S.W.2d 621, 624-25 (Tenn. 1960)) (no Tenn. R. App. P. 11 application filed). *See In re D.Y.H.*, 226 S.W.3d at 331 (favorably citing *Gouvitsa*). This rule does not apply, of course, to appellate review of a juvenile court’s decision.

¹¹ “The juvenile court shall be a court of record; . . . and any appeal from any final order or judgment in . . . [a] dependent and neglect proceeding, filed under this chapter, may be made to the circuit court that shall hear the testimony of witnesses and try the case *de novo*.” Tenn. Code Ann. § 37-1-159(a).

App. 236, 322 S.W.2d 239, 250 (1958) (holding that after the court acquires dependency and neglect jurisdiction, “any future order made by the Juvenile Court . . . concerning the care, custody and support of these children . . . will be subject to review by appeal to the Circuit Court”).

In re D.Y.H., 226 S.W.3d at 331-32.

The statutes also describe what is to occur pending appeal to the circuit court and how the circuit court is to proceed on appeal.

(b) An appeal does not suspend the order of the juvenile court, nor does it release the child from the custody of that court or of that person, institution or agency to whose care the child has been committed. Pending the hearing, the criminal court or circuit court may make the same temporary disposition of the child as is vested in juvenile courts; provided, that until the criminal court or circuit court has entered an order for temporary disposition, the order of the juvenile court shall remain in effect.

(c) When an appeal has been perfected, the juvenile court shall cause the entire record in the case, including the juvenile court’s findings and written reports from probation officers, professional court employees or professional consultants, to be taken forthwith to the criminal court or circuit court whose duty it is, either in term or in vacation, to set the case for an early hearing. When an appeal is taken from a juvenile court’s decision that involves the removal of a child or children from the custody of their natural or legal parents or guardian or from the department of children’s services, or when the decision appealed involves the deprivation of a child’s liberty as the result of a finding that such child engaged in criminal activity, such hearing shall be held within forty-five (45) days of receipt of the findings and reports. **In its order, the criminal court or circuit court shall remand the case to the juvenile court for enforcement of the judgment rendered by the criminal court or circuit court.** Appeals from an order of the criminal court or circuit court pursuant to this subsection (c) may be carried to the court of appeals as provided by law.

Tenn. Code Ann. § 37-1-159(b) and (c)(emphasis added).

The appeal from juvenile court to circuit court in a dependency and neglect case is not the same as this court’s review of trial court decisions, as set out in the Tennessee Rules of Appellate Procedure. That is because, by statute, the circuit court is to “hear the testimony of witnesses and try the case *de novo*.” Tenn. Code Ann. § 37-1-159(a). This directive, to hear the case *de novo*, is important to resolution of the issues in this appeal.

While the record of the juvenile court proceedings is required to be provided to the circuit court on appeal, Tenn. Code Ann. § 37-1-159(c), the circuit court is not limited to that record. On

the contrary, the circuit court in a dependency and neglect proceeding may not rely solely on the record made before the juvenile court, but under Tenn. Code Ann. § 37-1-159(c) must try the case *de novo* by hearing witnesses again and by rendering an independent decision based on the evidence received in the circuit court proceeding. *Tennessee Dept. of Children's Services v. T.M.B.K.*, 197 S.W.3d 282, 289 (Tenn. Ct. App. 2006); *In re M.J.B.*, 140 S.W.3d at 651; *In re M.E.*, M2003-00859-COA-R3-PT, 2004 WL 1838179, at *5 (Tenn. Ct. App., August 16, 2004) (perm. app. denied Nov. 8, 2004). Black's Law Dictionary defines a *de novo* trial as "[a] new trial on the entire case - that is, on both questions of fact and issues of law - conducted as if there had been no trial in the first instance." *Kissick v. Kallagher*, W2004-02983-COA-R3-CV, 2006 WL 1350999, at *3 (Tenn. Ct. App. May 18, 2006) (no Tenn. R. App. P. 11 application filed). Consequently, the circuit court is not "reviewing" the juvenile court's decision; instead, it is conducting a new proceeding as though the petition were originally filed in circuit court.

A circuit court's trial *de novo* of a case originally initiated in juvenile court, under Tenn. Code Ann. § 37-1-159(a), is analogous to a circuit court trial in an appeal of a case originally initiated in general sessions court, which also requires a *de novo* trial. There is essentially "no difference in the effect of an appeal from general sessions court for a trial *de novo* and the effect of an appeal from juvenile court for a trial *de novo*." *State v. Mays*, W1999-01499-COA-R3-CO, 2000 WL 705979, at *2 (Tenn. Ct. App. May 26, 2000) (no Tenn. R. App. P. 11 application filed). The cases analyzing general sessions appeals have consistently found that the matter is tried in circuit court as if no other trial had occurred. *Ware v. Meharry Medical College*, 898 S.W.2d 181, 184 (Tenn. 1995).

In a *de novo* trial the Circuit Judge does not review the action of the General Sessions Judge and is not concerned with what took place in the General Sessions Court nor the propriety of the lower Court's action; and no presumption of correctness attaches to the General Sessions judgment. The matter is tried as if no other trial had occurred.

Cooper v. Williamson County Board of Education, 746 S.W.2d 176, 181 (Tenn. 1987) (quoting *Hohenberg Bros. Co. v. Missouri Pacific Railroad Co.*, 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979)).¹²

VII. ANALYSIS

The gravamen of Father's argument on appeal is that once a child is found to be dependent and neglected, jurisdiction to determine custody remains with the juvenile court until one of the events in Tenn. Code Ann. § 37-1-103(a)(1) occurs terminating its jurisdiction *i.e.* dismissal,

¹²Our courts have also analogized the *de novo* trial of Tenn. Code Ann. § 37-1-159(a) with the appeal of proceedings before a juvenile court referee to a juvenile court judge in Tenn. Code Ann. § 37-1-107(e) which merely references a "hearing." *Kissick v. Kallagher*, 2006 WL 1350999, at *2-3. In *Kelly v. Evans*, the court held that the "hearing" contemplated by Tenn. Code Ann. § 37-1-107(e) was a hearing like in a general sessions appeal to a circuit court and not an appeal merely upon the record. *Kelly v. Evans*, 43 S.W.3d 514, 515 (Tenn. Ct. App. 2001).

transfer, majority, or adoption petition. Father argues that since the juvenile court found the children were dependent and neglected and since the circuit court recognized that at one time such finding was accurate, then the matter should have been remanded to the juvenile court to determine custody even though the situation creating the dependency and neglect had been removed.

It is clear that when a juvenile court finds a child to be dependent and neglected and that finding is not disturbed on appeal, then the juvenile court retains jurisdiction over custody of that child until one of the events in Tenn. Code Ann. § 37-1-103(c) occurs that terminates that jurisdiction. In the case before us, however, since the circuit court held a trial *de novo* then, as discussed previously, it is as though the juvenile court proceeding never occurred. Consequently, after the circuit court rendered its decision, any findings by the juvenile court about neglect and dependency were of no effect whatsoever.

The circuit court took evidence and found that the children were not, at the time of that hearing, dependent and neglected. It accordingly dismissed Father's petition as directed by Tenn. Code Ann. § 37-1-129(a)(1). The circuit court was required to dismiss the case since it found that the children were not dependent and neglected. Dismissal was clearly an event that terminated the juvenile court's jurisdiction. Additionally, Tenn. Code Ann. § 37-1-159(c) requires that a circuit court deciding a dependency and neglect appeal from juvenile court remand the case to the juvenile court for enforcement of the circuit court's order.

Had the circuit court's decision been made earlier, had it been based on essentially the same evidence as the juvenile court heard, and had the court still concluded there was not clear and convincing evidence that the children were dependent and neglected, then there would be no question that the circuit court's decision dismissing Father's petition ended the juvenile court's jurisdiction and that the circuit court was correct in ordering the juvenile court to put in place the custody arrangement that existed before the dismissed petition was filed.

There are two circumstances in the present case that distinguish it. The first is the length of time between the juvenile court hearing and the circuit hearing. In most situations, when a circuit court tries a neglect dependency case *de novo*, it is deciding the case based roughly on the same set of circumstances that existed when the juvenile court heard the matter. This is true, not because the circuit court is in any way limited to evidence presented in the prior juvenile court hearing, but because normally the case is reheard by the circuit court within the forty-five (45) days set by the statute for a hearing. Tenn. Code Ann. § 37-1-159(c).

In this case, however, more than a year passed between the hearing before the juvenile court and the *de novo* hearing before the circuit court, and the facts and circumstances had vastly changed.¹³ This fact made this case procedurally more complicated and gave rise to the grounds

¹³ Father attempts to argue on appeal that the circuit court on appeal was somehow limited to hearing evidence of facts as they existed more than a year earlier when the juvenile court heard the matter. Since the circuit court
(continued...)

raised by Father in this appeal. By the time of the circuit court hearing, Mother was not living with stepfather and ultimately divorced him. The circuit court concluded that she removed the circumstances that created the dependency and neglect.

It was the language that the circuit court used that is the second circumstance that has given rise to Father's argument. If the circuit court had simply found that the children were not dependent and neglected, then Tenn. Code Ann. § 37-1-129(a)(1) would have required dismissal. In that circumstance, the circuit court would then have remanded the case to juvenile court under Tenn. Code Ann. § 37-1-159(c) for the case to be dismissed. The fact in this case, however, that forms the basis of Father's argument is that the circuit court made an independent ruling that at one point the children were neglected and dependent but that those circumstances no longer existed.¹⁴

As explained earlier, in a *de novo* appeal, the circuit court does not review the juvenile court's decision or determine the validity of the juvenile court's action. Instead, the circuit court is to make its own decision based on the evidence presented to it. Consequently, we cannot conclude that the circuit court's finding that "pursuant to father's original petition filed in Juvenile Court, the parties minor children were dependent and neglected and it was appropriate to transfer temporary legal custody to father" has any effect on that court's ultimate finding that the children were not dependent and neglected.

There is no question that the circuit court clearly determined that the children were not dependent and neglected since it ordered the petition dismissed. The fact that the court chose to couch its findings in terms of removal of the conditions supporting a finding of dependency and neglect does not alter its ultimate holding that the children were not dependent and neglected at the time it heard Father's petition.

Father does not challenge the sufficiency of the evidence underlying the court's decision, and based on our review of the record, we find there was not clear and convincing evidence that the children were dependent and neglected. Consequently, we would affirm the trial court's holding on that issue. Accordingly, under Tenn. Code Ann. § 37-1-129(a)(1), the petition was required to be dismissed and any restriction previously ordered removed.

The circuit court recognized that because the petition was dismissed, there existed no legal basis for any custody order that differed from the one in effect before the petition was filed.

¹³(...continued)

proceeding is *de novo*, there is clearly no such restriction. Since the purpose of a dependency and neglect proceeding is to protect the welfare of the child, a court should hear evidence of the present situation so that it can make a decision, including custody if appropriate, based on the child's best interest at the time of the decision.

¹⁴The circuit court may have believed this comment was important to the attorney fee issue discussed later herein or as an acknowledgment that the juvenile court did not err based on the facts as they existed when the juvenile court heard the matter.

Accordingly, the court ruled that the court which had entertained the divorce had jurisdiction to modify that order.

Based on the above law and reasoning, the judgment of the trial court dismissing the dependency and neglect petition and ordering reinstatement of the pre-existing parenting arrangement is affirmed.

V. ATTORNEYS' FEES

As a final matter, Mother appeals the award of attorney's fees to Father by the juvenile court on May 26, 2006 of \$28,582.37. After the juvenile court's decision in November of 2005 finding dependency and neglect and placing custody with Father, the court also awarded Father \$28,582.37 in attorneys' fees. Upon appeal, the circuit court ordered that the issue of attorneys' fees be determined on remand to the juvenile court. On November 1, 2007, Mother petitioned the juvenile court for attorneys' fees as the prevailing party in the circuit court action and as an offset to the fees previously awarded Father. On December 12, 2007, the juvenile court denied Mother's request for fees. Consequently, Mother appeals the juvenile court's decision to award Father attorneys' fees and deny her request.

First, it is recognized that attorneys' fees are available in custody matters. *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn. 1989). See *Kirkpatrick v. O'Neal*, 197 S.W.3d 674, 681 (Tenn. 2006). Second, this court has found that Tenn. Code Ann. § 36-5-103(c)¹⁵ authorizes award of attorneys fees in a dependency and neglect action between two parents who had entered into a court decree governing custody. *Shofner v. Shofner*, 232 S.W.3d 36, 38-39 (Tenn. Ct. App. 2007).

There is no question that at one point Mother participated in a situation that caused her children to be dependent and neglected which justified placement of the children in Father's care. Based on the facts of this case, we do not find the juvenile court erred, and the decision regarding attorneys' fees is also affirmed.

¹⁵Tenn. Code Ann. § 36-5-103(c) provides as follows:

(c) The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

The trial court is affirmed. Costs of appeal are taxed equally between Kenneth Raymond Green and Michelle A. Green for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE